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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner

v.

BETTY DOLAR KAZUBOWSKI,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

PETITIONER'S REPLY BRIEF

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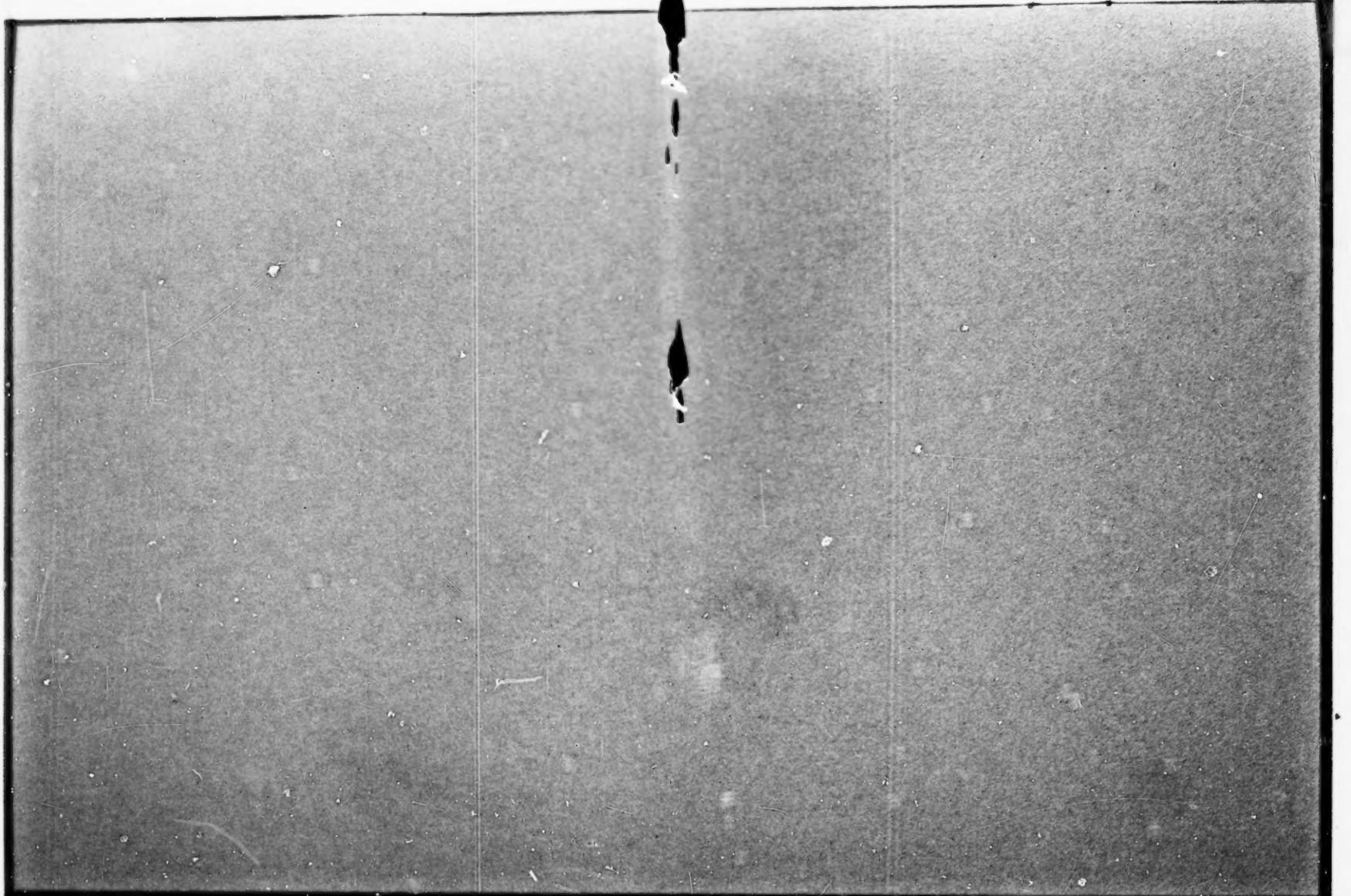

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PETITIONER'S REPLY BRIEF

Petitioner hereby makes reply to arguments raised in respondent's brief opposing the petition, under the same roman numeral headings as the related subject is raised in respondent's argument.

I.

THE CONSTITUTIONAL QUESTIONS WERE TIMELY RAISED

Respondent's answer supplies logic and reason to petitioner's demonstration that the constitutional questions were timely raised. In part IV of her answer, respondent reviews in detail the provisions of Illinois statutory procedure and related rules of the Supreme Court, and then concludes:

> "Under these rules the judges and other parties have no power to limit the contents of the record on appeal. . .
>
> * * *
>
> ". . . . In addition, there is no statute or rule of court authorizing the trial court to make orders limiting the praecipe or the contents of the record on appeal. . ."

In part III of her answer, as demonstrated herein, respondent concedes that the penalty imposed on petitioner for exercising his right to appeal was indefensible, by failing to defend it. The order fixing lump sum alimony and providing a property settlement, in full satisfaction of all alimony claims, could not coexist with the order providing additional alimony pending appeal.

Petitioner therefore had no reason to anticipate that the Appellate Court would not follow established law of the state of Illinois in deciding his appeal to it. There was neither need nor occasion to invoke the Constitution of the United States until after the Appellate Court had decided the case, and thereby exhausted plaintiff's opportunity to obtain further review as a matter of right.

II.

THE DECREE OF AUGUST 31, 1966 WAS ENTERED WITHOUT GRANTING PETITIONER THE FULL HEARING TO WHICH CONSTITUTIONALLY ENTITLED

Respondent's argument in support of the decree of August 31, 1966 misstates the record, in her description of petitioner's motion, directed against the unauthorized stipulation.

The decree of August 31, 1966 was entered after presentation to the trial court of petitioner's written Motion To Amend Stipulation Or In The Alternative To Void Stipulation, with its supporting papers. Those papers included a detailed affidavit by petitioner, setting forth specifically all conversations and negotiations relating to the authority given Mr. Perona, who had executed the stipulation in petitioner's name, as well as a positive and specific denial of any authority having been conferred on Mr. Perona to make the change in the stipulation relating to the second lien.

The supporting papers included a motion prepared by Mr. Perona to amend the stipulation (R 53-54), and an affidavit Mr. Perona had prepared for execution by petitioner. (R 55) Mr. Perona's motion recited:

> "1. That the attorney for this defendant who executed said stipulation was not authorized by this defendant to agree that the trust deed provided for therein was to constitute a second lien on said real estate."
>
> * * *
>
> "3. That if the words 'which shall constitute a second lien' are not eliminated from said stipulation, the provisions of said stipulation do not constitute the agreement of this defendant and the entire stipulation should be voided and of no effect."

The affidavit prepared by Mr. Perona stated:

"1. That this defendant authorized Attorney Louis J. Perona to agree that the future payments agreed to between the parties was to be secured by a trust deed on the real estate in Kewanee, Illinois, owned by the parties but did not authorize said attorney to agree that said trust deed would constitute a second lien on said real estate.

"2. . . . this defendant would be unable to deliver to the plaintiff a trust deed which will constitute a second lien on said real estate and for this reason has never authorized his attorney to agree to same on his behalf."

The factual showing made by petitioner's motion and supporting papers was not controverted by any evidence, nor by counter-affidavit. There was no basis whatever for the trial court's finding that petitioner consented to the decree. The stipulation which supposedly embodied his consent was unauthorized because containing an unauthorized provision. Had respondent been willing to have the stipulation amended by elimination of the unauthorized [redacted] there would have been consent, but she was unwilling to do so.

Respondent would have this court close its eyes to the unsupported determination that the stipulation was authorized, asserting that the "Trial Court is the proper forum in which to determine the extent of the authority of an attorney for a party to the case."

Such an abdication of judicial duty would of course open the door to judgments and decrees entered without due process of law, as was this one. Such a suggestion is on a par with respondent's assertion, in her brief to the Appellate Court, impliedly suggesting that weight should be given to a decision because "written by the trial judge while a member of this court . . ." (Appellee's Brief, p. 9). There should be objective review of the action of the trial court, without regard to the court or courts on which he has sat.

III.

THE DECREE OF AUGUST 31, 1966 PENALIZED PETITIONER FOR EXERCISING HIS RIGHT TO APPEAL AND THEREBY DENIED HIM DUE PROCESS OF LAW

Here respondent's answer deals with a false issue of her own making, and defaults on the true issue. Although more than liberal, petitioner did not challenge the provisions of the decree of August 31, 1966 awarding respondent attorney's fees and costs of appeal. They were not plainly and uncontrovertibly a penalty imposed on petitioner for taking an appeal.

The weekly alimony awarded respondent was such a penalty, because it was added to, rather than credited upon the lump sum alimony, which, with a property settlement, had previously been decreed by the court as in full satisfaction of all her claims for alimony.

It would have been a simple matter to have provided for such credit. In *Goldstine v. Goldstine*, 25 Ill. App. 2d 319, 167 N.E.2d 30 (1960), temporary alimony, pendente lite, was so credited. Had this been done there would have been no penalty imposed upon petitioner, and respondent's interests would have been fully protected.

IV.

PETITIONER WAS DENIED A FAIR APPEAL BY DENIAL OF THE RECORD DEEMED BY HIM NECESSARY FOR SUCH APPEAL

Respondent misstates the record in treating the docket entry of September 29, 1966 as if "an informal notation by the Judge", in his private notes, made for his personal convenience.

The docket entry recorded official action by the court, in the official record, maintained for that purpose. The

clerk's certificate preceding the entry, and the entry, (App. 30, R 156) read as follows:[1]

> "BE IT REMEMBERED, that afterward, on the 29th day of September, A.D. 1966, the same being still one of the regular Court days, the following, among other proceedings, was had and duly entered of record, in the words and figures as follows, to wit:
>
> Officers present:
> Honorable Conway L. Spanton, Associate Judge
>
> * * *
>
> "September 29, 1966—Motion to Amend Notice of Appeal heard and allowed except as to matters of up to and including final Decree of Divorce entered June 13, 1966. Objections to Praecipe heard and sustained as to said matter. (See Order re Motion) CLS",

The meaning of the entry sustaining objections of respondent is clear, in the light of those objections, (R 138) which stated:

> [redacted]
>
> Now comes the plaintiff-appellee and objects to the praecipe served upon him (sic) September 21, 1966 and to that portion thereof which requires the Clerk of this court to prepare a copy of the records for those pleadings and portions that precede August 31, 1966 for the reason that all of said events are concluded and the time for appeal has passed and in the absence of an order or direction from the Appellate Court of the State of Illinois, Third District, all of said matters preceding August 31, 1966 are immaterial and irrelevant to thsi appeal."

The status of the docket entry as an official record of the court is also established by the clerk's certificate (R

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[1] The initials of the judge indicate that he made the entry. The direction to see the "Order re Motion" obviated the necessity of any other docket entry relating to that order on file. The entry appears twice in the trial court record—once at R 156, and again in the photocopy of the docket pages relating to the case in the circuit court, R 417.

412) where he attest the record of trial court proceedings "to be a true, perfect and complete copy of all records and proceedings beginning July 8, 1966 through December 8, 1966 in the matter of Betty Dolar Kazubowski v. Edward J. Kazubowski, Chancery case No. 65D-1240 as they appear from the Records and Files of said Court now in my office remaining."

That status is further confirmed by the order of October 19, 1966 (App. H, p. 23-27) which allowed the notice of appeal to be amended so as to extend to orders subsequently entered, including the docket entry in question.[2]

Respondent's ~~Defendant's~~ contention that there was no official record of an order sustaining his objections to the praecipe is patently untrue.

Nor can fault be found with the docket entry because made by the judge in his own hadnwriting. A docket entry normally is made by the clerk in brief form; some times it is accompanied by a more formal, expanded order, as a protection against error by the clerk in summarizing the order of the court.

When the judge who made the judicial determination personally makes the entry in the official docket, the possibility of such error is avoided. There is no need for another duplicating order, on a separate paper. Were there need for

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[2]That order provided in part (App. p. 24):

". . . the Court further finds that the Circuit Court of Henry County, Illinois, has entered additional and subsequent Orders, Rulings, or determinations from and since the date of September 15, 1966, and which said Orders, Rulings or determinations have been entered of record only in the minute orders of the Docket Entries, and which said Orders, Rulings or determinations may hereafter become written Orders of said Court, and are as follows:

"The Order or ruling allowing the Objections to Praecipe and that portion thereof excluding the Decree of Divorce granted to plaintiff-appellee upon June 13, 1966, and excluding all matters prior thereto, entered upon September 29, 1966;"

such an order, the responsibility to have it entered would have been respondent's under the rule of the Circuit Court of Henry County requiring the prevailing party to prepare such an order. (App. B, p. 2)

In view of the order sustaining objections to the praecipe, the clerk in preparing and certifying the record had no choice but to obey it. By statute (Ill. Rev. Stat. 1967, ch. 25 Sec. 13), clerks of court are required to "perform all duties pertaining to their own offices as may be required by law or the rules and orders of their courts respectively." The clerk is subject to judicial control, but possesses no judicial powers,being a ministerial officer of the court, and subject to contempt for failure to obey court orders. *People v. Windes*, 275 Ill. 108, 113 N.E. 949 (1916); Ex Parte Thatcher, 7 Ill. 167 (1845); *Village of Melrose v. Barnard*, 126 Ill. 496, 18 N.E. 671 (1888).

Respondent relies on *People v. Koning*, 18 Ill. App. 2d 119, 151 N.E. 2d 103, and *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 115 N.E. 2d 226. Both of those cases involved personal notes of the judge, rather than official records of court action, and are plainly inapplicable.

CONCLUSION

Respondent to the contrary notwithstanding, the decision of the Appellate Court, effectively allows a trial court to shorten the record on appeal, so as to preclude review of its orders. The integrity of appellate review is thereby jeopardized by this precedent.

Respectfully submitted,

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